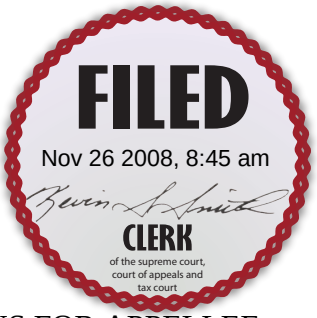

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IN THE
COURT OF APPEALS OF INDIANA

GERALD RICKERT,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 56A04-0805-CR-289
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE NEWTON SUPERIOR COURT
The Honorable Daniel J. Molter, Judge
Cause No. 56D01-0605-FB-5

November 26, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Gerald Rickert appeals his conviction for Armed Robbery, a Class B felony, and his adjudication as an habitual offender following a jury trial. He presents the following issues for our review:

1. Whether the trial court abused its discretion when it admitted into evidence items police found in his car pursuant to a warrantless search.

2. Whether the trial court abused its discretion when it permitted evidence of his prior bad acts.

3. Whether the trial court erred when it ordered his habitual offender sentence enhancement to be served consecutive to an habitual offender sentence enhancement in another cause.

We affirm in part, reverse in part, and remand with instructions.

FACTS AND PROCEDURAL HISTORY

Between December 22, 2005, and May 4, 2006, six robberies of businesses took place "in the area" near Roselawn. Police investigating the robberies developed a profile of a suspect: a white male in his late 30's or early 40's, approximately 5'7" to 5'10", with some facial hair, with reddish or light brown hair, wearing a dark hat and "yellow" sunglasses. Transcript at 75. The suspect also displayed a silver handgun during the robberies and drove a gold four-door station wagon. One robbery victim saw the suspect's license plate number and recorded it as 55Q176. DeMotte Police Department Officer Steven Musch saw surveillance video taken during one of the robberies and observed that the suspect wore "a dark ball cap with white tabs on top, red lettering in front . . . [and] white lettering underneath the red lettering[, and he] had sunglasses on, and [he] displayed a silver handgun." Id. at 77.

On May 4, 2006, Officer Musch was on patrol in DeMotte when he saw a gold Saturn station wagon drive by, and the driver was a white male in his late 30's or early 40's. Officer Musch saw the license plate number, which was close to the number reported by one of the robbery victims. Officer Musch followed the car and got a closer look at the suspect when he stopped at a McDonald's restaurant. The suspect drove away, and, after following the car for a short time, Officer Musch initiated an investigatory stop.[1] The driver identified himself as Rickert, and he told Officer Musch that his driver's license was suspended.

Officer Musch determined that in addition to Rickert's driving with a suspended license, there was also an outstanding warrant for Rickert's arrest. Accordingly, Officer Musch arrested him. After handcuffing Rickert, Officer Musch saw a pair of amber-colored sunglasses sitting on the passenger seat of Rickert's car, and he saw a black baseball cap with red and white lettering and white grommets sitting on the passenger seat floor. Officer Musch observed that the hat looked like the one the suspect was wearing in the surveillance video he had seen. In a "search incident to arrest," Officer Musch found a silver handgun underneath the driver's seat. Id. at 81.

The State charged Rickert with armed robbery, a Class B felony, in connection with the April 20, 2006, robbery of The Smoke Shop in Roselawn. The State also charged Rickert with being an habitual offender. Prior to trial, Rickert filed a motion to suppress the evidence police found in his car during a warrantless search. The trial court denied that motion, and a jury found Rickert guilty as charged. The trial court entered

[1] Rickert does not challenge the validity of the stop on appeal.

judgment accordingly and sentenced Rickert to an aggregate term of forty-two years. This appeal ensued.

DISCUSSION AND DECISION

Issue One: Search

Rickert first contends that the trial court abused its discretion when it admitted into evidence items police found during a warrantless search of his car. In particular, he maintains that the search of his car incident to his arrest violated Article I, Section 11 of the Indiana Constitution. We cannot agree.

Rickert challenges the admission of evidence related to the warrantless search of his car in the course of his arrest and the warrantless seizure of incriminating items. Although Rickert filed a motion to suppress, he proceeded to trial after denial of that motion; thus, the sole claim now is whether the trial court abused its discretion in admitting the evidence. See Baxter v. State, 891 N.E.2d 110, 117 (Ind. Ct. App. 2008). An abuse of discretion occurs if a decision is clearly against the logic and effect of the facts and circumstances before the court. Id. In reviewing the trial court's ultimate ruling on admissibility, we may consider the foundational evidence from the trial as well as evidence from the motion to suppress hearing that is not in direct conflict with the trial testimony. Id.

Rickert alleges only a violation of his rights under Article I, Section 11 of the Indiana Constitution; he makes no claim under the Fourth Amendment to the United States Constitution. "The legality of a governmental search under the Indiana Constitution turns on an evaluation of the reasonableness of the police conduct under the

totality of the circumstances." Id. (quoting Litchfield v. State, 824 N.E.2d 356, 359 (Ind. 2005)). Although there may be other relevant considerations under certain circumstances, generally the reasonableness of a search or seizure turns on a balancing of: 1) the degree of concern, suspicion, or knowledge that a violation has occurred, 2) the degree of intrusion the method of the search or seizure imposes on the citizen's ordinary activities, and 3) the extent of law enforcement needs. Id.

Rickert contends that the circumstances of this case are analogous to those in State v. Moore, 796 N.E.2d 764 (Ind. Ct. App. 2003), trans. denied. In Moore, a police officer initiated a traffic stop after he observed the defendant make a turn without using a turn signal. The officer determined that the defendant's driver's license was suspended and that he had previously violated that suspension. Accordingly, the officer placed the defendant under arrest. An officer then searched the defendant's vehicle and found a handgun under a seat. On appeal, this court held that absent evidence that the search was conducted out of concern for officer safety, the search violated Article I, Section 11 of the Indiana Constitution. In particular, we stated, "[w]e see no facts which indicate that Officer Zotz needed to search the car in order to find and preserve evidence connected to the crime of driving while suspended, nor can we perceive of any such situation arising out of this charge." Id. at 771 (emphasis added).

But here, Officer Musch did not search Rickert's car for evidence connected to a traffic stop. Instead, given Rickert's physical characteristics, that he was driving a gold station wagon, that the license plate number was similar to that recorded by an

eyewitness, and the hat and sunglasses in plain view inside the car,[2] Officer Musch had reasonable suspicion that Rickert had committed several robberies. Accordingly, Officer Musch searched the car for evidence connected to the robberies. The search underneath the driver's seat, where Officer Musch found the silver handgun, did not impose any undue degree of intrusion upon Rickert; and Officer Musch testified that he felt that it was important to preserve evidence of the robberies before the car was towed. Rickert has not demonstrated that the search violated Article I, Section 11 of the Indiana Constitution. The trial court did not abuse its discretion when it admitted into evidence the hat, sunglasses, and handgun.

Issue Two: Prior Bad Acts

Rickert next contends that the trial court abused its discretion when it admitted evidence of his prior bad acts. The decision to admit or exclude evidence is within a trial court's sound discretion and is afforded great deference on appeal. Carpenter v. State, 786 N.E.2d 696, 702 (Ind. 2003). We will not reverse the trial court's decision unless it represents a manifest abuse of discretion that results in the denial of a fair trial. Id. An abuse of discretion occurs where the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court or it misinterprets the law. Id. at 703.

[2] Officer Musch testified that he saw the hat and sunglasses in plain view inside the car. And he testified that both the hat and sunglasses looked like those the suspect was wearing in the surveillance video taken during one of the robberies. As such, his seizure of those items did not violate Article I, Section 11 of the Indiana Constitution. See Warner v. State, 773 N.E.2d 239, 245 (Ind. 2002) (under the plain view doctrine, "if police are lawfully in a position from which to view the object, if its incriminating character is immediately apparent, and if the officers have a lawful right of access to the object, they may seize it without a warrant").

Indiana Evidence Rule 404(b) provides that evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. "It may, however, be admissible for other purposes, such as proof of motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident[.]" Id. In order for evidence of other crimes, wrongs, or acts to be admissible, the trial court must determine whether the evidence is relevant "for other purposes" than the defendant's propensity to commit the charged act and must balance the probative value of the evidence against its potential prejudicial effect pursuant to Evidence Rule 403. Evid. Rule 404(b); Barker v. State, 695 N.E.2d 925, 930 (Ind. 1998). The well-established rationale behind Evidence Rule 404(b) is that the jury is precluded from making the "forbidden inference" that the defendant had a criminal propensity and therefore engaged in the charged conduct. Rhodes v. State, 771 N.E.2d 1246, 1251 (Ind. Ct. App. 2002), trans. denied.

Here, the victim of the April 20 robbery could not identify Rickert as the man who robbed her. Accordingly, the State sought to introduce evidence regarding the string of robberies to prove the identity of the robber. The identity exception in Rule 404(b) was crafted primarily for crimes so nearly identical that the modus operandi is virtually a "signature." Allen v. State, 720 N.E.2d 707, 711 (Ind. 1999). "The exception's rationale is that the crimes, or means used to commit them, were so similar and unique that it is highly probable that the same person committed all of them." Id. For instance, a "particular piece of clothing may form the basis for admissibility." 12 ROBERT LOWELL MILLER, INDIANA PRACTICE § 404.225 at 526-27 (2007). Use of the

same weapon may be relevant. See id. at 527. And the proximity in time and location of previous crimes will bear on the admissibility of such evidence. See Washington v. State, 422 N.E.2d 1218, 1220 (Ind. 1981).

Here, the State introduced evidence that police developed a profile of the suspect in the robberies in the area around Roselawn. Police believed that the suspect was a white male with reddish or light brown hair, who was 5'7" to 5'10", who wore a dark hat and yellow or amber colored sunglasses, who wielded a silver handgun, and who drove a small, gold station wagon. In order to prove Rickert's identity as the robber in the April 20 Smoke Shop robbery, the State introduced some evidence showing that victims of each of the robberies described the suspect as a man with Rickert's basic physical characteristics. And the victim of an April 14 robbery saw the suspect drive away in a "smaller, gold station wagon" with a license plate number close to Rickert's. Transcript at 75.

We cannot say that the trial court abused its discretion when it permitted some evidence regarding the string of robberies given the suspect's "signature" hat, sunglasses, and silver handgun and the proximity in time and location of the robberies. The trial court restricted the evidence to testimony regarding the physical similarities of the suspect as reported by other victims. The trial court explicitly admonished the State that evidence regarding other details of the previous robberies would be excluded. Accordingly, the evidence of the other robberies was minimal. Specifically, two police officers testified only that six other robberies had occurred in the area, five of which had occurred in the two weeks just before the instant offense. And the officers explained that

they developed a profile of the suspect based upon how the victims of the previous robberies had described him. Officer Musch explained that it was based upon that profile that he recognized Rickert driving the gold station wagon and made the investigatory stop. Any prejudice to Rickert was outweighed by the probative value of the evidence.

In sum, given the short time-frame of five of the six robberies, the fact that a gold station wagon was associated with two of the robberies, and the fact that the other victims described similar physical characteristics of the suspect, including the hat, the silver handgun, and the amber or yellow sunglasses, we cannot say that the trial court abused its discretion when it permitted the evidence of the other robberies to show why Officer Musch suspected that Rickert had robbed The Smoke Shop on April 20. Again, the victim in this case could not identify Rickert as the man who robbed her. And Officer Musch could only identify Rickert based upon the profile of the suspect that police had developed based upon the previous robberies and the surveillance video he had seen.

But, even assuming that the evidence was admitted in error, that error was harmless. An error in admitting evidence will be found harmless if its probable impact on the jury, in the light of all of the evidence in the case, is sufficiently minor so as not to affect the substantial rights of the parties. Berry v. State, 715 N.E.2d 864, 867 (Ind. 1999). Here, Rickert's sister watched the surveillance video of the robbery at the Smoke Shop and identified Rickert as the robber. And Officer Musch identified the hat, sunglasses, and gun found in Rickert's car as those used by the man who robbed the Smoke Shop. Under these circumstances, any error in the admission of evidence of the previous robberies was harmless.

Issue Three: Sentence

Finally, Rickert contends that the trial court erred when it ordered that the habitual offender enhancement in this case be served consecutive to an habitual offender enhancement the Lake Superior Court imposed in another cause. The State concedes that the trial court should have ordered that the enhanced portion of the sentence in this case to run concurrent with the enhancement in the Lake County case. Indeed, our Supreme Court has held that, absent express statutory authorization for imposing multiple habitual offender sentences, whether in a single proceeding or in multiple proceedings, a trial court does not have such authority. See Starks v. State, 523 N.E.2d 735, 737 (Ind. 1988). We remand and instruct the trial court to amend its sentencing order with respect to the habitual offender enhancement in this case. That enhancement shall be served concurrent with the sentence enhancement in the Lake County cause.

Affirmed in part, reversed in part, and remanded with instructions.

MAY, J., and ROBB, J., concur.